No. 22038

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM R. HAMBERG and EDWINA HAMBERG,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITION FOR REVIEW OF THE DECISION OF THE

TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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OPINION BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 6-19) are not officially reported.

JURISDICTION

This petition for review (R. 21-24) involves federal income taxes for the taxable year 1959. On April 13, 1965, the Commissioner of Internal Revenue mailed to the taxpayers notice of a deficiency in the amount of $3,694.99. (Doc. No. 2; R. 6.) Within ninety days thereafter, on May 14, 1965, the taxpayers filed a petition with the Tax Court for a redetermination of that deficiency under the provisions of Section 6213 of the Internal Revenue Code of 1954. (Doc. No. 2.)

The decision of the Tax Court was entered March 29, 1967. (R. 2(
This case is brought to this Court by a petition for review file(
June 26, 1967 (R. 21-24), within the three-month period prescrib(
in Section 7483 of the Internal Revenue Code of 1954. Jurisdict
is conferred on this Court by Section 7482 of that Code.

QUESTION PRESENTED

Did the transfer in October, 1959, of property and money by Florence Murray to the taxpayers in exchange for their agreement provide her with a home and maintenance for the rest of her life qualify as a non-taxable gift within the meaning of Section 102(the Internal Revenue Code of 1954 or did it result in taxable in of $11,594.02 to the taxpayers in that year under Section 61(a) the Code as determined by the Tax Court?

STATUTES INVOLVED

Internal Revenue Code of 1954:

> SEC. 61. GROSS INCOME DEFINED.
>
> (a) General Definition.--Except as otherwise provided in this subtitle, gross income means all income from whatev source derived, including (but not limited to) the followin items:
>
> (1) Compensation for services, including fees, commissions, and similar items;
>
> * * *

(26 U.S.C. 1964 ed., Sec. 61.)

SEC. 102. GIFTS AND INHERITANCES.

(a) General Rule.--Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance.

* * *

(26 U.S.C. 1964 ed., Sec. 102.)

STATEMENT

The facts, as stipulated by the parties (R. 1-5) and as found by ax Court (R. 6-15), may be summarized as follows:

William R. Hamberg and Edwina Hamberg, husband and wife and pyers in this case, are residents of Priest River, Idaho. They e their joint federal income tax return for the year 1959 with istrict Director of Internal Revenue at Boise, Idaho. (R. 1, 7.)

For many years there had existed a warm personal friendship wen the taxpayers and John and Florence Murray. Since the death Jnn Murray in 1954, the friendship between taxpayers and Florence ontinued and Florence often relied upon William Hamberg for ad- eand counsel. (R. 7-8, 29-35.)

In 1955, Florence executed a will naming William as executor. 157 she executed a second will, and at William's request named ter person executor. The record does not disclose the nature of estamentary dispositions or the beneficiaries named in her 1955 957 wills. (R. 8, 35-37.)

On March 9, 1959, Florence made a third will, naming leyn Luckey as executrix. (R. 8, 37.) This will provided, in rt as follows: (R. 9-10):

I hereby declare that I am a widow and that my husband, John J. Murray, died about five years ago, and that I have no children.

FIRST: I direct my executrix hereinafter named to arrange for my funeral * * *.

SECOND: I direct my executrix to pay all my just debts and funeral expenses * * *.

THIRD: I direct that from the monies that I have on deposit at the Newport Branch of the National Bank of Commerce of Seattle shall first be paid the amount described in the second provision above, then the further sum of $150.00 shall be used by the executrix for the purpose of instituting proceedings for the probate of this my Last Will and Testament, and the remainder thereof I give and bequeath as follows:

(a) To Nona Murray, my sister-in-law, who resides at 405 E. 7th Avenue, Spokane, Washington, five-eleventh's of said remainder;

(b) to Lee Nacaarato, of Priest River, Idaho, one-eleventh of said remainder;

(c) to June Prill, of Priest River, Idaho, one-eleventh of said remainder;

(d) To Gloria Bauer, of Priest River, Idaho, one-eleventh of said remainder;

(e) To Harold Luckey, of Priest River, Idaho, one-eleventh of said remainder;

(f) To Claudia Luckey, of Priest River, Idaho, one-eleventh of said remainder;

(g) And to Sandra Hamberg, of Priest River, Idaho, one-eleventh of said remainder.

FOURTH: I give and bequeath to Gloria Bauer the dinette set located in my home.

FIFTH: I give and bequeath to Dorothy Peloquin, of Priest River, Idaho, the writing desk located in my home.

SIXTH: I give and bequeath to Marjean Duley, of Priest River, Idaho, the automatic washer located in my home.

> SEVENTH: All the rest, residue and remainder of my estate, real, and personal, of every kind whatsoever, and wheresoever situated, I give, devise and bequeath to Madelyn Luckey of Priest River, Idaho.

11 of the beneficiaries named in the will dated March 9, 1959, h he exception of Nona Murray, were friends or neighbors.[1/] No vi ion was made therein for either William or Edwina Hamberg.).)

n August 31, 1959, Florence entered Bonner County General p:al at Sandpoint, Idaho, at the request of her physician. September 16, 1959, she was released from the hospital and ited to the Sandpoint Manor Rest Home at Sandpoint. She disliked est home and complained about the treatment which she received r. During October, 1959, she communicated with the taxpayers in rseparate letters concerning her desire to leave the rest home. -2, 10.)

In all but the last letter, Florence stated, in effect, that if yers would secure her release and provide her with a home she ll pay them, and in the first letter dated October 5, 1959, stated .ll pay you well and change my will so that you will get every- ig." (R. 10.)

On October 7, 1959, taxpayers visited Dar Cogswell, an attorney andpoint, and related the circumstances concerning Florence, nly, that they contemplated obtaining her medical release and kng care of her, and that she had express an intention to sfer her property in consideration therefor. Taxpayers also

---

[1/] Nona Murray was Florence's sister-in-law. Sandra Hamberg is ayers' daughter. (R. 10.)

checked with Florence's physician concerning her, and he issued a certificate for her release. (R. 11, 40.) On that same day, she was released from the rest home and moved into the taxpayers' home (R. 2, 11.) Prior to going to their home, taxpayers took Florence to see Cogswell. (R. 11, 41.) Both parties informed Cogswell of their intention to execute an agreement providing for the transfer Florence's property to taxpayers in exchange for her future care a maintenance. They requested Cogswell to prepare the necessary leg documents to effectuate this intention. (R. 11, 49.) Both Floren and William wanted a written agreement so that her future care wou be assured. (R. 11, 53.)

Taxpayers and Florence thereupon executed an agreement provid for the transfer of her property in exchange for the taxpayers' promise to care for and maintain her. (R. 11.) The agreement, da October 7, 1959, provided in part as follows (R. 2, 11-12):

> THIS AGREEMENT Made this 7th day of October, 1959, between FLORENCE MURRAY, a widow, party of the first part, and WILLIAM R. HAMBERG and EDWINA HAMBERG, husband and wife, parties of the second part, WITNESSETH:
>
> WHEREAS Party of the first part has arrived at an advanced age in life and desires to live with the parties of the second part in their home where she can be comfortable for the remainder of her life.
>
> NOW THEREFORE The said party of the first part hereby transfers and promises to transfer to the said parties of the second part, all of her property, both real and personal, wherever situated and of whatever kind and character, upon the agreement of the parties of the second part to furnish to her a comfortable home with the said parties of the second part.

> This agreement is made as the free and voluntary act of Florence Murray, a widow, party of the first part, and at her suggestion and request.

This agreement imposed upon the taxpayers an obligation to care and maintain Florence for the duration of her life,[2] and pursuant it, taxpayers received the following consideration (R. 2-3, 12):

Savings account, Idaho First National Bank, Priest River	$ 1,400.00
Savings account, Bank of Commerce, Newport, Washington	3,374.82
Checking account, Bank of Commerce, Newport, Washington	2,535.83
Vendor's interest in Roberson contract	1,222.60
Real property	3,500.00 [3]
Furniture and fixtures	500.00
	$12,533.25

Florence conveyed the items of property to taxpayers by proper thods of transfer. The realty was conveyed by warranty deed and e realty subject to the contract of sale to Roberson was conveyed quitclaim deed. Both instruments described the consideration for e transfer as "LOVE, AFFECTION, CARE, SUPPORT AND MAINTENANCE." e Roberson contract of sale was assigned to taxpayers under a parate document entitled "ASSIGNMENT OF CONTRACT," which described e consideration as "my care, support, maintenance, and whatever se may be necessary to make me reasonably comfortable during my fetime." (R. 2, 3, 12-13.)

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[2] There also appears to have been an informal understanding that xpayers would pay Florence's burial expenses. (R. 12, 53.)

[3] In the notice of deficiency, the Commissioner had valued the alty and furniture and fixtures at $7,000. Accordingly, a computation of the deficiency was made for the purpose of the x Court's decision pursuant to Rule 50.

Having effected the transfer of all her property to the taxpayers, Florence then destroyed her will dated March 9, 1959 the presence of the taxpayers. (R. 3, 13.)

When Florence came to the taxpayers' home on October 7, 19 she was 86 years of age. She resided there until her death on October 21, 1959. (R. 3, 13.) Despite her advanced age her d was somewhat unexpected since her physician had stated to taxp on October 7, 1959, that her physical condition was such that s could live an indeterminate number of years. (R. 13, 46.) Dur this brief period taxpayers paid out the following amounts in c for Florence and paying her funeral expenses (R. 3, 13):

Her physician	$ 44.00
Powell (a physician)	10.00
White Cross Drug	5.00
Funeral arrangements	50.00
Moon Funeral Home	767.25
One night dress	2.98
Two weeks' care before death (est.)	60.00
	$939.23

Soon after Florence's death on October 21, 1959, Madelyn L the executrix named in the will which Florence had destroyed, i stituted probate proceedings in the Probate Court of Bonner Cou Idaho, and filed a copy of the destroyed will with the Court. (R. 3-4, 13-14.) Taxpayers employed Cogswell to represent them connection with the probate proceedings and initially they appe in the proceedings to contest the admission of the will to prob Subsequently, however, taxpayers decided not to contest the adm of decedent's will and withdrew from the proceedings. (R. 14,

After a hearing and consideration of the evidence adduced ein, the Probate Court, in September, 1962, entered an order tting the will to probate. There has been no appeal from the r of the Probate Court admitting Florence's will to probate. 4, 14.)

In 1962 or 1963, Madelyn Luckey, the executrix of the estate of ence Murray, deceased, filed a complaint against the taxpayers in District Court of Bonner County to set aside the property trans- and to recover the property transferred to the taxpayers on ber 7, 1959. The litigation in the District Court of Bonner ty is still pending. The case has not been set for trial, and District Court has not determined the validity of the agreement d October 7, 1959. (R. 4-5, 14.)

Taxpayers, on their return for the taxable year 1959, did not ude in their gross income any part of the value of the properties ived from Florence, nor did they deduct any of the expenses paid hem in caring for her or in arranging for her funeral. (R. 14; . Ex. 1-A.)

The Commissioner, in his statutory notice of deficiency, rmined that the fair market value of the property received, less expenses incurred, constituted ordinary income of the taxpayers. 14-15.)

The Tax Court determined as ultimate findings of fact the lowing (R. 15):

That the transfers of property and moneys involved in this case e made pursuant to a valid, binding contract;

That the transfers of property and moneys to the taxpayers we made by Florence in contemplation of receiving future services fro the taxpayers; and

That the transfers of property and moneys under the agreement dated October 7, 1959, resulted in taxable income of $11,594.02 to the taxpayers in the taxable year 1959.

Upon the basis of these facts and a recomputation agreed to by the parties, the Tax Court entered its decision ordering a deficiency in income tax due from the taxpayers for the year 1959 in the amount of $2,751.98. This appeal followed.

SUMMARY OF ARGUMENT

Florence Murray's primary concern in transferring her property to the taxpayers pursuant to their contractual agreement of October 1959, was her desire to leave the rest home and provide for her care and maintenance in the home of the taxpayers. Such transfers proceeded not from a "detached and disinterested generosity" or "of affection, respect, admiration, charity or like impulses," which denote a gift in the statutory sense, but from "the constraining force of a * * * legal duty" and from "'the incentive of anticipated benefit' of an economic nature." Therefore it was not a gift within the meaning of Section 102(a) of the 1954 Code but resulted under Section 61(a) of the Code in taxable income to the taxpayers in the year in the amount of $11,594.02.

ARGUMENT

THE TAX COURT WAS CLEARLY CORRECT IN ITS FINDING THAT FLORENCE MURRAY'S TRANSFER OF ALL HER PROPERTY TO THE TAXPAYERS IN OCTOBER, 1959, IN EXCHANGE FOR THEIR AGREEMENT TO PROVIDE HER WITH A HOME AND MAINTENANCE FOR THE REST OF HER LIFE WAS NOT A NON-TAXABLE GIFT WITHIN THE MEANING OF SECTION 102(a) OF THE INTERNAL REVENUE CODE OF 1954 BUT ON THE CONTRARY RESULTED UNDER SECTION 61(a) OF THE CODE IN TAXABLE INCOME TO THE TAXPAYERS IN THAT YEAR IN THE AMOUNT OF $11,594.02

The sole issue for determination in this case is whether the perty and money transferred by Florence Murray to the taxpayers October 9, 1959, gave rise to taxable income under Section 61(a) the Internal Revenue Code of 1954, supra, or whether they constituted non-taxable gifts within the meaning of Section 102(a), ra. The amount in controversy represents the difference between value of the money and property Florence Murray thus transferred the taxpayers and the amount taxpayers expended for her care and port before her death on October 21, 1959. The taxpayers argue t since the value of the property transferred considerably exied the expenses incurred for Florence's support, that the transfer for less than an adequate and full consideration, and therefore excess was non-taxable under Section 102(a) of the Code as a gift. arriving at this conclusion taxpayers rely solely on the concept

of "gift" found in Section 2512(b) of the 1954 Code.[4/] However, his reliance is misplaced. The present controversy concerns the tax-payers' liability for income tax on the property and money received from Florence Murray and so involves the application not of the gift tax laws, but of the income tax laws. Moreover, Section 102 of the Code, which excludes gifts from income tax, and Section 2512(b) of the Code, which deems any transfer for less than an adequate and full consideration a gift for the purpose of imposing a gift tax on it, are not construed in pari materia; a transfer which should be classed as a gift under the gift tax law is not necessarily to be treated as a gift income-tax-wise. Farid-Es-Sultaneh v. Commissioner, 160 F. 2d 812, 814-815 (C. A. 2d, 1947). This dichotomy exists because the income tax and gift tax each has its own independent criteria of taxability. Lockard v. Commissioner, 166 F. 2d 409, 412 (C. A. 1st 1948). In United States v. Davis, 370 U.S. 65 (1962), the Supreme Court addressed itself to this very issue in fn. 6, p. 69:

> Any suggestion that the transaction in question was a gift is completely unrealistic. * * * To intimate that there was a gift to the extent the value of the property exceeded that of the rights released not only invokes the erroneous premise that every exchange not precisely equal involves a gift but merely raises the measurement problem discussed in Part III, infra, p. 71. Cases in which this Court has held transfers

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4/ Internal Revenue Code of 1954:

SEC. 2512. VALUATION OF GIFTS.

* * *

(b) Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.
(26 U.S.C. 1964 ed., Sec. 2512.)

> of property in exchange for the release of marital rights subject to gift taxes are based not on the premise that such transactions are inherently gifts but on the concept that in the contemplation of the gift tax statute they are to be taxed as gifts. Merrill v. Fahs, 324 U.S. 308 (1945); Commissioner v. Wemyss, 324 U.S. 303 (1945); see Harris v. Commissioner, 340 U.S. 106 (1950). In interpreting the particular income tax provisions here involved, we find ourselves unfettered by the language and considerations ingrained in the gift and estate tax statutes. See Farid-Es-Sultaneh v. Commissioner, 160 F. 2d 812 (C. A. 2d Cir. 1947). (Emphasis supplied.)

The criteria to be used in determining whether a transfer unts to a gift under Section 102(a) of the Code were restated by Supreme Court in Commissioner v. Duberstein, 363 U.S. 278, 285 60):

> * * * if the payment proceeds primarily from "the constraining force of any moral or legal duty," or from "the incentive of anticipated benefit" of an economic nature, * * * it is not a gift.
>
> A gift in the statutory sense, * * *, proceeds from a "detached and disinterested generosity," * * * "out of affection, respect, admiration, charity or like impulses." * * *

The Supreme Court added (pp. 285-286):

> And in this regard, the most critical consideration * * * is the transferor's "intention." * * * "What controls is the intention with which payment, however voluntary, has been made."

hin this framework the issue is essentially one of fact.

The evidence shows that Florence Murray's primary concern at e time of the transfer was to leave the rest home which she ex-edingly disliked and to make arrangements for her own future care d maintenance. (R. 2, 10, 38-40.) To this end, Florence appealed the taxpayers repeatedly stating in as many as four separate tters that if they would secure her release and provide her with a

home she would pay them well and change her will so that they would get everything. (R. 2, 10.) Before any transfer was made, Florence first executed a written agreement with the taxpayers providing for the transfer of her property to the taxpayers in exchange for their promise to provide for her future care and maintenance. This agreement imposed upon the taxpayers an obligation to care for and maintain Florence for the duration of her life and pursuant to it Florence transferred and promised to transfer to taxpayers all of her property. (R. 2, 11, 12.) Both Florence and the taxpayer William Hamberg and this instrument to assure Florence that she would be cared for during her life. (R. 11, 46-47, 53.) Florence then by proper methods of conveyance transferred all of her money and property to the taxpayers pursuant to her valid legal obligation. In this respect it is clear the transfers to taxpayers proceeded primarily from the "constraining force of a moral or legal duty" and as such then cannot be said to be gifts. Bogardus v. Commissioner, 302 U.S. 34, 41 (1937). The discharge of a legal obligation, including payment for services rendered or consideration paid pursuant to a contract, is in no sense a gift. Robertson v. United States, 343 U.S. 711, 713 (1952). Moreover, the fact that Florence wanted a written instrument explicitly defining the contractual relationship between the parties is incompatible with the contention that she was motivated by a "detached and di

5/

erested generosity" and intended to make a gift to the taxpayers.

In their brief taxpayers repeatedly assert that the transfer sisted of a part purchase, part gift transaction--the purchase ng equated to the amount they expended for her support, any excess ng intended by her as a gift. (Pet. Br. 22, 24, 26.) However, the penstance that the value of the money and property Florence trans-red to the taxpayers turned out to be more than the value of what received does not make the excess a gift under Section 102(a) n she never manifested the intention to make a gift in the first 6/ tance.

In Commissioner v. Duberstein, supra, the Supreme Court pointed that the question whether a transfer amounts to a "gift" for ome tax purposes is primarily one of fact, and therefore primary ght in this area must be given to the conclusions of the trier of t. The court stated (p. 290):

In this respect it is significant to note that since Florence ray had no immediate family, all the beneficiaries named in her t will dated March 9, 1959, with the exception of a sister-in-law, e friends or neighbors; however, no provision was made therein for her of the taxpayers. Apparently Florence did not contemplate ving anything to the taxpayers. Her later offer to change her will transfer everything to them was done in exchange for their promise care for and maintain her for the rest of her life.

Conceivably Florence could have had the requisite intent to make a t of the excess, if any, if at the time of the transfer she con-plated the possibility of an unequal exchange in the taxpayers' vor rather than a "quid pro quo" transaction. However, the evidence es not support such a theory. There is nothing to show that Florence d not think she was receiving a full "quid pro quo." On the contrary, r death within two weeks of the transfer was unexpected since her ysician had stated on October 7, 1959, that her physical condition s such that she could live an indeterminate number of years. . 13, 46.) Had she lived for these indeterminate number of years, e transfers to taxpayers could have fallen short of meeting the ex-nses of their obligation. Moreover, as the Tax Court pointed out ere was an informal understanding that taxpayers would pay Florence's rial expenses. (R. 12, fn. 2.) Actually, taxpayer William Hamberg

(fn. 6 continued on following page)

> One consequence of this is that appellate review of determinations in this field must be quite restricted. * * * Where the trial has been by a judge without a jury, the judge's findings must stand unless "clearly erroneous." * * * The rule itself applies also to factual inferences from undisputed basic facts, * * * as will on many occasions be presented in this area. * * * And Congress has in the most explicit terms attached the identical weight to the findings of the Tax Court.

After consideration of all the factors in this case, the Tax Co[u]rt found that the property conveyed to the taxpayers by Florence M[a]y was not a "gift" but was transferred pursuant to a valid, bindi[n]g contract in contemplation of receiving future services from the taxpayers. We contend that this conclusion is not only not "cl[e]arly erroneous," but, in fact, is the only conclusion reasonably jus[t]ified by the evidence presented.

CONCLUSION

For the reasons stated above, the decision of the Tax Cour[t] is correct and should be affirmed.

Respectfully submitted,

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January, 1968.

6/ (fn. 6 continued from previous page)
testified that Florence was worried that her money might give o[ut] she would not have anything. (R. 35.) Accordingly, the eviden[ce] dicates not only that Florence was not aware that the value of [the] she conveyed to taxpayers might be in excess of the value of th[e] promise to provide for her, but, in fact, she was worried that [it] might not be enough to support her for the remainder of her lif[e]

CERTIFICATE

I certify that, in connection with the preparation of this brief,
ve examined Rules 18, 19, and 39 of the United States Court of
als for the Ninth Circuit, and that, in my opinion, the foregoing
f is in full compliance with those rules.

d: _____ day of January, 1968.

_____
Attorney